Supreme Court, U.S.
FILED
MAY 7 1991
OFFICE OF THE CLERK

(2)

No. 90-1548

IN THE SUPREME COURT OF THE UNITED STATES

Term: October 10, 1990

SILVIA KAISER a/k/a SILVIA KAISER BLOCK,
Individually, Petitioner

v.

BERNHARD MARTIN PEER, Individually, and
BEVERLY SUE SANDERS, Individually, and
BERINTEX COMPANY, LTD.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPERIOR COURT OF FULTON

COUNTY, GEORGIA

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

GEORGE O. LAWSON, JR.
Georgia Bar No. 440200
970 M.L. King, Jr. Drive
Suite 202
Atlanta, Georgia 30314
(404) 522-6964

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a citizen of a foreign country defending a civil lawsuit brought in a Georgia Court in the United States can invoke the privilege against self incrimination afforded by the Constitutions of the United States and of the State of Georgia based on her alleged fear of prosecution in a foreign country under a foreign statute.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii-iv
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2 - 5
SUMMARY OF ARGUMENT	6 - 7
ARGUMENT	8 -21
CONCLUSION	22 -23
CERTIFICATE OF SERVICE	24

TABLE OF AUTHORITIES

Cases:

United States v. Kordel, 397 U.S. 1 (90 SC 763, 25 LE2d 1)(1970) 8

McCarthy v. Arndstein, 266 U.S. 34 (45 SC 16,k 69 LE 158) (1924) 8

United States vs. Curtis-Wright Export Corp., 299 U.S. 304, 318 (1936) 10

Malloy v. Hogan, 378 U.S. 1 (1964) 10

Kastigar v. United States, 406 U.S. 441, 453 (1972) 10

Balzac v. Porto Rico, 258 U.S. 298 (1922) 11

Ocampo v. United States, 234 U.S. 91 (1914) 11

Dorr v. United States, 195 U.S. 138 (1904) 11

Hawaii v. Mankichi, 190 U.S. 197 (1903) 11

Downes v. Bidwell, 182, U.S. 244 (1901) 11

Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972) 12, 15

Johnson v. Eisentrager, 339
U.S. 763 (1950) 13, 21

Kwong Hai Chen v. Coldwing,
344 U.S. 590, 596 (1953) ... 14

Wong Wing v. United States,
163 U.S. 228, 238 (1986) ... 14

In Re Grand Jury Proceedings
(the Bank of Nova Scotia),
740 F.2d 817 (11th Cir. 1984),
cert. denied 469 U.S. 1106,
105 S. Ct. 778, 83 L.Ed. 2d
774 (1985) 16

United States v. Payner, 447
U.S. 727, 732 N.4, 100
S.Ct. 2439, 2444 N.4, G5
L.Ed. 2d 468 (1980) 17, 18

Reid v. Covert, 354 U.S. 1
(1957) 21

United States Constitution
Fifth Amendment 1, 6,
7, 8, 10,12,
13, 14, 15,
18, 19, 22

State of Georgia Constituion
Article 1, Section 1,
Paragraph 16 .....1, 3, 6

CONSTITUTIONAL PROVISIONS INVOLVED

This case is predicated on the Fifth Amendment to the Constitution of the United States which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

State of Georgia Constitution, Article 1, Section 1, Paragraph 16

> No person shall be compelled to give testimony tending in any manner to be self-incriminating.

RESPONDENTS' STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct, however, Respondents supplement the statement of facts as set out below.

Petitioner seeks relief of this Court to prevent Respondents from questioning her as to ownership interests during Petitioner's management of certain Liechtenstein entities.

Respondents show that the case sub judice was instituted against Petitioner for converting investments which she obtained from Respondents in Liechtenstein to her own use in the United States of America. Respondents allege, among other things, that the Petitioner invested their funds in real properties, oil and gas wells and oil

and gas pipe lines and has informed the Respondents that their investments failed and their money was lost. The truth is Petitioner received and continues to receive monthly royalties from Respondents' investments.

Petitioner alleges that to answer certain discovery questions propounded to her will subject Petitioner to punishment under Liechtenstein secrecy laws which prevents a licensed trustee from revealing the names of persons holding an ownership interest in Liechtensteinian entities. Respondents assert that the laws of Liechtenstein do not prohibit the Petitioner from answering the discovery questions as propounded even in Liechtenstein; and the United States Constitution and Constitution of the State of Georgia do not provide any privilege which would

allow the Petitioner to be relieved of answering any questions.

Respondents show that the alleged pending prosecution against Petitioner in Liechtenstein has no connection whatsoever with the issue at hand. Further, the pending prosecution is not related to the issues of revealing the owners and beneficiaries of Holfina Trust or any other entity to which Petitioner is related in her capacity as a licensed trustee. Instead, the prosecution Petitioner alleges in Liechtenstein, if any, relates solely to a claim made by numerous investors who allege that they have been defrauded of their investment by the Petitioner and the information sought by Respondents would be available to those victims of Petitioner as well since the controlling statute in

Liechtenstein allows discovery of all secrets to a "legitimate private interest."

SUMMARY OF ARGUMENT

Petitioner was ordered by the Superior Court of Fulton County on Respondents' Motion to Compel to answer certain pertinent questions propounded to her at her deposition in the matter of Peer et al v. Kaiser et al. Petitioner refused to answer the questions propounded and asserted a Fifth Amendment privilege pursuant to the Constitution of the United States and the privilege against self-incrimination under the Constitution of the State of Georgia. The Supreme Court of Georgia denied Petitioner's application for an appeal and this writ of certiorari ensued.

Indeed, Petitioner is not afforded Fifth Amendment protection against self-incrimination in this civil proceeding in that the Fifth Amendment

privilege is a fundamental trial right and any prosecution that may result would be in Liechtenstein since the alleged law violated is Liechtenstein law.

In addition to there being no Fifth Amendment privilege against self incrimination afforded Petitioner, Respondent contends that the Petitioner is required to answer the questions propounded because there is a legitimate private interest in the Respondents which requires an answer under Liechtenstein law.

Petitioner's argument regarding the secrecy laws of the country of Liechtenstein "does not allow her to transact business under the laws of this country and state, yet cloak herself with the veil of secrecy under the laws of a foreign country."

ARGUMENT

The issue before the Court is not one of a constitutional nature wherein the establishment of a precedent is required. To the contrary, the issue before the Court is one of a discovery nature only that was correctly ruled on by the trial court and the Supreme Court of Georgia and the granting of a Writ of Certiorari is not required.

It is beyond question that a party may invoke his Fifth Amendment privilege to matters sought to be discovered in civil proceedings. United States v. Kordel, 397 U.S. 1 (90 SC 763, 25 LE2d 1)(1970); McCarthy v. Arndstein, 266 U.S. 34 (45 SC 16,k 69 LE 158)(1924). The issue before this Court is not whether a party may invoke her Fifth Amendment privilege to matters sought in a discovery

proceeding, but instead whether or not an alien is afforded protection in the United States of America for an alleged violation of foreign secrecy statutes in a foreign country pursuant to that country's law and not a violation of any Georgia statute or any U.S. statute where no prosecution will be conducted in the United States of America.

As stated above, Petitioner cannot be prosecuted in the United States for a violation of Liechtenstein secrecy laws and it is unquestioned that the Constitution of the United States is not applicable to the citizens of Liechtenstein in matters arising in and prosecuted in Liechtenstein. This Court has consistently held that neither the Constitution nor the laws passed pursuant to it have any force in a foreign territory except as applied

to its own citizens in such territory. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

Moreover, unlike the Fourth Amendment, the Fifth Amendment privilege against self incrimination is a fundamental trial right of criminal defendants. See Malloy v. Hogan, 378 U.S.1 (1964). A Fifth Amendment Constitutional violation occurs only at trial. See Kastigar v. United States, 406 U.S. 441, 453 (1972). It being obvious that no criminal trial will ever occur in the United States or one of its territories regarding the alleged Liechtenstein prosecution based on Liechtenstein law, affirmatively shows that the Petitioner has no Fifth Amendment privilege against self-incrimination available to her in the present discovery process.

Petitioner's position is contrary to this Court's decision in the Insular cases, which hold that not every constitutional provision is available even where the United States has sovereign power. See, e.g., Balzac v. Porto Rico, 258 U.S. 298 (1922) (Fifth Amendment) right to jury trial inapplicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914)(Sixth Amendment grand jury provision inapplicable in Philippines); Dorr v. United States, 195 U.S. 138 (1904)(jury trial provision inapplicable in Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (provisions on indictment by grand jury and jury trial inapplicable in Hawaii); Downes v. Bidwell, 182 U.S. 244 (1901) (revenue clauses of Constitution inapplicable to Puerto Rico).

Equally important, the Petitioners reliance upon Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972) is misplaced. This Court correctly ruled in Zicarelli without addressing the Constitutional issue raised by Respondent in this appeal. Again, it should be noted by the Court that Petitioner incorrectly framed the issue presented in this case. The real issue is whether the Fifth Amendment privilege against self-incrimination is available to an alien protecting that alien from prosecution under foreign laws in a foreign country. The Petitioner presents, incorrectly, that the issue is whether or not an alien is entitled to the Fifth Amendment privilege against self-incrimination. The framing of the issue by Petitioner does not inform the

Court of sufficient facts for the Court to address the writ sought by Petitioner.

This Court squarely addressed the real issue presented here in Johnson v. Eisentrager, 339 U.S. 763 (1950), and rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.

The Johnson Court held that enemy aliens arrested in China and imprisoned in Germany after World War II could not obtain writ of habeas corpus in our federal courts on the ground that their convictions for war crimes had violated the Fifth Amendment and other constitutional provisions.

Considering that this Court's analysis in Johnson, supra, is correct and that the Insular cases are correct,

the Petitioner's claim that the protection of the Fifth Amendment extends to aliens in foreign countries is totally without merit.

Respondent agrees that aliens receive certain constitutional protections when they have come within territories of the United States and developed substantial connections with this country. See, e.g., Kwong Hai Chew v. Coldwing, 344 U.S. 590, 596 (1953) (resident alien is a "person" within the meaning of the Fifth Amendment); Wong Wing v. United States, 163 U.S. 228, 238 (1986) (resident aliens entitled to Fifth and Sixth Amendment rights).

The Petitioner does not fall within the class of persons protected who are aliens who have come within the territory of the United States because

her Liechtenstein prosecution, if any, is not a prosecution that will occur in the United States. Again, Respondent would agree that Petitioner would be afforded the Fifth Amendment privilege against self-incrimination if she had even the remote fear of being prosecuted in the United States.

Further, Petitioner has no Fifth Amendment privilege against self-incrimination relating to the secrecy laws of the country of Liechtenstein. In Zicarelli the questions could have been answered without admitting to a crime. In the case sub judice, if Petitioner answers the question propounded and there was no legitimate private interest in the Respondents, she might be found to be violating the secrecy laws of Liechtenstein. However, the trial court was correct in

its ruling on the Motion to Compel wherein the Court held "...that Defendant should not be allowed to transact business under the laws of this country and state, yet cloak herself with the veil of secrecy under the laws of a foreign country."

In the 11th Circuit Court of Appeal in In Re Grand Jury Proceedings (the Bank of Nova Scotia), 740 F.2d 817 (11th Cir. 1984), cert. denied, 469 U.S. 1106, 105 S. Ct. 778, 83 L.Ed. 2d 774 (1985), the Court held that U.S. Courts could find civil contempt and impose sanctions to compel a person to violate foreign bank secrecy laws by producing documents that are located on foreign soil. In that case, the court concluded that the inevitability of conflict between laws of different countries did not excuse one from

compliance with United States law who chooses to operate in the United States and such other countries.

Also in United States v. Payner, 447 U.S. 727, 732 N.4, 100 S.Ct. 2439, 2444 N.4, G5 L.Ed. 2d 468 (1980), this Court has held that "foreign bank secrecy laws provide no privacy rights for U.S. Citizens that are not otherwise present under the constitution and laws of the United States."

Petitioner's case fits within these cases in this way: While a foreign citizen with liabilities under foreign law, she chose to operate in the United States to commit fraud against the Respondents. By being a foreign citizen she does not obtain greater protection than a U.S. Citizen would have under the same facts and circumstances. A U.S. Citizen would

not be able to rely on the possibility of prosecution by some unknown third party in a foreign country as a shield to protect him from answering questions by raising the 5th Amendment privilege. Payner, supra. Petitioner, likewise, should not have greater privileges than a U.S. Citizen.

The Petitioner seeks the protection of the Fifth Amendment to avoid possible future prosecution in the Country of Liechtenstein, if an owner of one of the entities she manages or controls seeks to prosecute her under the law requiring such information to be kept confidential. (J.A. 16 - 19)

The question of ownership of Holfina Trust does not go to the issue of fraud and theft, but instead goes to who benefits from such fraud and theft, if it exists.

Petitioner did not assert the 5th Amendment on the ground that to answer the question would give evidence that could be used to convict her of fraud and theft, but supposedly to protect her from committing what she says is a new and different crime under Liechtenstein law - revealing a third party ownership interest in a Liechtenstein entity. The crime for which Petitioner fears prosecution has not yet occurred. Therefore, Petitioner's grounds for refusing to answer pertinent questions is based on mere speculation.

The same law provides that "the perpetrator shall not be punished where the disclosure...is justified...by a...duly authorized private interest." (J.A. 18)

And that "The perpetrator shall only be prosecuted upon the demand of the person whose interest in secrecy was impaired". (J.A. 18 - 19)

The trial court held a hearing on Respondent's Motion to Compel, received Petitioner's evidence in opposition to the motion and was asked to rule on whether or not Respondents were a legitimate private interest and whether or not there was a real danger of prosecution of Petitioner, if she were required to answer. The trial court ruled against Petitioner on both issues. (J.A. 1 - 5)

In cases involving the extra territorial application of the Constitution, this Court has taken care to state whether the person claiming

constitutional protection is a citizen, see, e.g. Reid v. Covert, 354 U.S. 1 (1957), or an alien, see, e.g., Johnson, supra. The distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any judicial relationship between our country and the undefined, limitless class of non-citizens who are beyond our territory.

Petitioner falls within the class of non-citizens, i.e. alien, who is not afforded constitutional protections for prosecution in a foreign country of a foreign statute.

CONCLUSION

The issue as to whether or not Petitioner is afforded Fifth Amendment protection against self-incrimination for prosecution in Liechtenstein for an alleged violation of secrecy laws is not one of first impression and this Court has consistently rejected the claim that aliens such as Petitioner are entitled to Fifth Amendment privileges outside the sovereign territory of the United States. Therefore, Petitioner not being a United States citizen, the United States Constitution not having any force or effect in Liechtenstein, and considering that no trial will ever be held in the United States or its territories regarding this matter, the Petitioner is not afforded any protections pursuant to the Fifth

Amendment of the United States Constitution or any similar provision of the Constitution of the State of Georgia.

Accordingly, the Petitioner's prayer for a writ of certiorari to review the decision of the Superior Court of Fulton County, and cert. denied by the Supreme Court of Georgia, in this case should be denied by this Honorable Court.

Respectfully submitted,

George O Lawson, Jr.

George O. Lawson, Jr.
Georgia Bar No. 440200
Attorney for Respondents

970 M.L. King, Jr. Drive
Suite 202
Atlanta, Georgia 30314
(404) 522-6964

CERTIFICATE OF SERVICE

I, George O. Lawson, Jr., certify that I have served three copies of the foregoing Brief in Opposition by placing same in the United States mail with sufficient postage attached thereto to insure delivery to the following attorneys:

Thomas L. Todd, Esquire
Kutak, Rock & Campbell
4400 Georgia Pacific Center
133 Peachtree Street, N.
Atlanta, Georgia 30303

Ben F. Johnson, III, Esquire
Alston & Bird
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424

Paul R. Jordan, Esquire
Fine & Block
Paran Place
2060 Mount Paran Road, NW
Atlanta, Georgia 30327

This the 8th day of May, 1991.

George O Lawson Jr
George O. Lawson, Jr.